IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 424 of 2000

in

SPECIAL CIVIL APPLICATION No 8195 of 1999
with
Civil Application No.6614 of 2000

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI
and
Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgement? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURAT MAHILA NAGRIK SAHAKARI BANK LTD
Versus
MAMTABEN MAHENDRABHAI JOSHI C/O SHARAD S PATHAK

Appearance:
Mr.V.B.Patel, Senior Advocate, with
MR DEEPAK V PATEL for the Appellant
MR AK CLERK for the Respondent

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI
and
MR.JUSTICE P.B.MAJMUDAR

Date of decision: 21/04/2001

C.A.V. JUDGEMENT

(Per : MR.JUSTICE P.B.MAJMUDAR)

1. This Letters Patent Appeal is directed against the order of the learned single Judge dated 9th May, 2000 passed in Special Civil Application No.8195 of 1999, by which the learned single Judge has dismissed the Special Civil Application, which was filed by the present appellant and confirmed the orders passed by the Industrial Court as well as by the Labour Court.

2. The facts leading to the controversy are as under :-

The appellant is a Cooperative Bank. It appoints the employees in different categories, i.e. Apprentice (Trainee), temporary employee, thereafter Probationer; and on completion of probationary period, permanent appointment is given to such employee. The aforesaid mode of recruitment is provided in the Model Standing Orders applicable to the appellant bank.

3. The present respondent was initially appointed as a Trainee in the Bombay Market Branch between 13th March, 1990 and 21st March, 1991, and different orders from time to time were given to her. Thereafter, she was appointed as Clerk-cum-Cashier-cum-Typist on temporary basis, for which initially appointment order was given for one month and from time to time, fresh temporary orders were given to her. As per the terms and conditions of each of the appointment orders, the appointment was for a period of one month. It is also provided that the services can be terminated on the expiry of the said period without notice and that the appointment is temporary and by such appointment order, no right to get appointed to any existing vacancy is given. Accordingly, such fixed term orders for 29 days were issued from time to time in favour of the respondent and on expiry of the said period, the same was subsequently extended from time to time by fresh temporary appointment orders. Last of such appointment orders was issued by the Bank for the period from 4th January, 1992 to 3rd February, 1992. By the said time, the respondent had worked as a temporary clerk for a period of 10 months. After 3rd February, 1992, no fresh order was given to her and virtually, therefore, her services were terminated after 3rd February, 1992. The said termination was challenged by the respondent-employee by filing T-Application No.249 of

1992 before the Labour Court, Surat, as, according to the respondent, the action of the Management, by which she was not given fresh appointment order, amounts to termination of her services without following the provisions of the Industrial Disputes Act. The respondent prior to moving the Labour Court wrote an Approach Letter dated 11.4.1992 to the Management and the same was replied by the Management.

In the reply to the Approach Letter, it was stated on behalf of the Management that, initially, she was appointed as a Trainee in the Bank and during training period, her work was not found satisfactory and, therafter, since there was temporary work which was required to be handled, temporary orders were given to her by which she was appointed as a Temporary Clerk. It was also stated by the Bank in their reply to the Approach letter that such temporary orders were given for fixed period and during that period, her work was not found satisfactory and, therefore, after the period of last temporary order was over, no further order was given to her. As per the said reply, the services of the respondent-employee came to an end the moment the tenure period mentioned in the order was over. In the said reply, it was also stated that as per the need of temporary work of bank, such tenure orders are given and that, therefore, the respondent had no right to ask for permanent appointment in the Bank. The Management also took the stand in their reply that there was no unfair labour practice adopted by the Bank.

4. Therafter, the respondent-employee approached the Labour Court by resorting to the provisions of the Bombay Industrial Relations Act, 1946, by filing an application under Sections 78 and 79 of the said Act, with a prayer for reinstatement with back wages. As per the say of the applicant, the order of the Bank, terminating her services, was illegal, arbitrary, and contrary to the provisions of Section 25-F of the Industrial Disputes Act. It is her say that she was serving in the institution since about 2 years as Junior Clerk and that she was continued on temporary basis for a long time and lastly her monthly salary was Rs.2,012/-. It is also the say of the respondent-employee that since she has worked for more than 240 days in the preceding year, her services could not have been terminated without following the procedure of law.

5. The appellant-Management appeared before the Court and filed the Written Statement and denied the averments made by the applicant in her application. It

was stated by the Bank that the applicant was initially appointed as a Trainee, but her work was not found satisfactory. As per their say, there was temporary need because of work load and she was given tenure order as a temporary clerk. Even during that period also, her work was not found satisfactory and, therefore, her temporary appointment was not further extended and, therefore, her services automatically came to an end moment the fixed period mentioned in the order of appointment was over. On these and such other averments, the said application of the employee was resisted by the Management.

6. Before the Labour Court, certain documents were produced by the applicant in the nature of various appointment orders. The opponent also produced certain documentary evidence before the Labour Court, such as Resolutions of the Committee, etc. Both the sides also led oral evidence before the Labour Court. After considering the oral as well as documentary evidence on record and after considering various case laws cited on behalf of both the sides and ultimately after hearing both the sides, in detail, the Labour Court came to the conclusion that the applicant was given artificial breaks from time to time and that she has completed 240 days continuously and, therefore, the Labour Court came to the conclusion that the work which the applicant was discharging with the Bank was of a permanent nature and that, along with the applicant, other employees were given such tenure orders by the Bank and they were subsequently confirmed by the Bank and as against that, the services of the applicant were terminated. The Labour Court also found that the impugned action of the Bank would amount to illegal retrenchment and that since the employee has worked for more than 240 days, her services could not have been terminated without following the procedure under Section 25-F of the Industrial Disputes Act. Ultimately, the Labour Court passed an order of reinstatement with full back wages by the judgment and order dated 11.2.1998.

7. The aforesaid order of the labour Court was challenged by the present appellant by way of Appeal, being Appeal (IC) No.2 of 1998, before the Industrial Court, Surat. The Industrial Court also confirmed the order of the Labour Court by coming to the conclusion that the concerned employee was serving on a temporary post, but the work which she was performing was of a permanent nature, that along with her, temporary orders were given to other employees and they were made permanent and the said benefit was not given to the applicant-employee and that the Bank has not followed the

procedure of Section 25-F of the Industrial Disputes Act. The aforesaid reasoning is given in paragraph 19 of the judgment by the Industrial Court. The Industrial Court accordingly dismissed the said appeal and confirmed the order of the Labour Court.

8. The aforesaid order of the Industrial Court was further challenged by the appellant Bank by way of filing Special Civil Application No.8195 of 1999. The learned single Judge, by his order dated 9th May, 2000, came to the conclusion that the Labour Court has not committed any error and there is no infirmity in the order passed by the Labour Court as well as by the Industrial Court and that there was neither jurisdictional error nor procedural error which can be said to have been committed by the courts below. The learned single Judge observed in his judgment that Section 2(oo)(bb) cannot be resorted to when employer has exercised powers mala fide and arbitrarily, and has abused / misused the power with a view to seeing that the respondent may not be entitled to the benefit and protection available under Section 25-F of the I.D. Act. The learned single Judge also observed that merely because the employer has right to terminate the services of an employee by satisfying three conditions enunciated under Section 25-F of the Act, the same cannot give him an unrestricted right. It is the duty of the employer to establish the fact that such termination is justified in the circumstances of the case. The learned single Judge also came to the conclusion that it was a case of colourable exercise of power by the Management and the said action is mala fide. Accordingly, the learned single Judge dismissed the Special Civil Application by confirming the orders of the Industrial Court as well as of the Labour Court. The present Letters Patent Appeal is filed against the aforesaid judgment of the learned single Judge.

9. Mr.V.B. Patel, learned Senior Counsel, has argued the matter in great detail and has taken us through various judgments of the Apex Court and various High Courts to substantiate his say that once there is a tenure, fixed term appointment, provisions of Section 25-F are not applicable and that, on completion of period of appointment, nothing further is required to be done by the Management as the employment comes to an end automatically moment the period prescribed for the same is over. It is submitted by Mr.Patel that the learned single Judge has travelled beyond the pleadings and evidence on record, in as much as, it is never the case of the applicant before the Labour Court or before the Industrial Court that the Management's action is nothing

but a colourable exercise of power or that it is arbitrary or tainted with mala fides. Mr.Patel further argued that, while deciding the matter, the learned single Judge was required to see whether any error of law or of jurisdiction is committed by the Labour Court or by the Industrial Court, but, surely, it was not open for the learned single Judge to make out a new case which was never pleaded or proved before the Labour Court and that in that sense, it was not an original proceedings before the High Court and, therefore, the learned single Judge should have confined his judgment only to the record of the case and not beyond that. It was also argued by Mr.Patel that if the reasoning of the Labour Court is contrary to the evidence on record or if relevant provisions of law and relevant pieces of evidence are not taken into consideration, it can be said that the Labour Court has committed an error of jurisdiction while exercising its power and in such cases, it would be open for the High Court to set aside such order as such finding of fact can be said to have been vitiated by non-consideration of relevant evidence and, to that extent, it can be said that there is a jurisdictional error committed by the Labour Court as well as by the Industrial Court. Mr.Patel further submitted that neither the Labour Court nor the Industrial Court nor the learned single Judge has properly appreciated the provisions of Section 2(oo)(bb) in their proper perspective and once there is a tenure appointment for a fixed period, Section 25-F is not applicable and moment the period mentioned in the appointment order is over, the employee can be sent home and, there is no need to follow the provisions of Section 25-F of the Act. In his view, therefore, moment there is a temporary order, nothing further is required to be done by the Management as the employee has got no right moment such period of appointment is over.

10. Mr.Patel further submitted that the concept of 240 days has no application when there is a tenure, fixed term appointment. Mr.Patel has relied on various judgments of the Apex Court and the High Courts interpreting the provisions of Section 2(oo)(bb), to which we will refer later on. Mr.Patel further argued that there is a procedure prescribed in the Model Standing Order, which is applicable to the appellant-bank and recruitment can be made only in the said manner. Mr.Patel also submitted that the work of the applicant-employee was found not satisfactory even during her temporary appointment and, therefore, it was open for the Bank not to continue her services on the said ground. He also further submitted that, it is, no doubt, true

that other employees, who were also appointed along with her on such temporary basis, were given regular appointment orders on the post of Clerk. However, in his submission since their work was found satisfactory, such orders were given, but the applicant-employee could not have insisted for similar benefit, as, during the temporary period, her work was found not satisfactory and the said fact was also brought to her notice by mentioning the said fact in her appointment order about her non-satisfactory work. Lastly, it was submitted by Mr.Patel that there was absolutely no pleading or even evidence about the vindictive action of the Management. No such particulars are also given and each order is a new order and it comes to an end moment the period mentioned in the same is over. It was, therefore, submitted by Mr.Patel that, in that view of the matter, the order of the Labour Court, which was confirmed by the Industrial Court, as well as by the learned single Judge is required to be set aside and since the appointment of the respondent was a tenure, fixed term appointment, it should be held that it is not necessary for the Bank to follow any procedure as it is open for the Bank not to continue such appointment further. Mr.Patel has also further submitted that if ultimately her work was found satisfactory, she would have been given the same benefits which were given to the other employees.

11. Mr.Clerk, on the other hand, has supported the judgment of the learned single Judge, the Labour Court as well as of the Industrial Court. Mr.Clerk submitted that the respondent could not have been denied the benefit of the provisions of the Industrial Disputes Act by adopting the tactic of appointing a person on such temporary basis with the sole object to deprive her the benefit of Section 25-F of the Act. He submitted that the work, which the respondent was performing, was of a permanent nature and that, on appreciation of evidence, when the Labour Court as well as the Industrial Court have come to the conclusion that the action of the Bank was illegal, the same, essentially being a finding of fact, is not required to be interfered with by this Court.

12. We have heard both the sides in detail. The main question which is required to be considered in detail is about applicability of Section 25-F of the Industrial Disputes Act as well as provision of Section 2(oo)(bb) of the Industrial Disputes Act. It is required to be considered whether when there is a temporary, fixed term appointment, the same would, ipso facto, take out the case from the applicability of Section 25-F of the I.D. Act.

It was argued by Mr.Patel that moment there is a fixed term appointment, nothing further is required to be seen and on completion of the period, if the services are not extended further, it is not open for the employee to make any grievance about non-compliance with the provisions of retrenchment. Mr.Patel argued that the object of introducing the aforesaid provision of Section 2(oo)(bb) itself is clear that moment the fixed term appointment is given, it cannot attract the provisions of Section 25-F of the I.D. Act.

13. Mr.Patel as well as Mr.Clerk have read the evidence led by the parties before the Labour Court, and we have also gone through the oral evidence adduced by both the sides before the Labour Court.

14. Mr.Patel's first argument is that the finding of fact regarding colourable exercise of power on the part of the Management is reached without there being any evidence on record and without there being any case of the employee pleaded before the Labour Court, and that a wrong question is addressed by the Court and the same is decided and, therefore, the said decision suffers from an error of jurisdiction as well as error of law. In T. Prem Sagar v. M/s. Standard Vacuum Oil Company, AIR 1965 SC 111, the Supreme Court has said that a writ of certiorari can be issued when the order of the inferior Tribunal is shown to suffer from an error which is apparent on the face of the record. It is not correct to say that unless an error of jurisdiction is established, or fraud proved, no writ of certiorari can be issued. When the Commissioner for Labour, who is empowered to deal with the question referred to in Section 51 of the Madras Shops and Establishments Act has given a decision that the appellant was a person employed and he was not in a position of management and if the Commissioner's order is shown to suffer from the infirmity or an error of law is apparent on the face of the record, the High Court would be justified in issuing a writ notwithstanding the fact that Section 51 of the Act purports to make the Commissioner's order final. The question, therefore, which is required to be considered is whether the courts below have applied any wrong principle or whether any material part of the evidence is misread while deciding the controversy in question. Therefore, in order to determine the said aspect, firstly, it is required to be considered whether the reasoning given by the Labour Court or by the Industrial Court is as per the evidence on record and whether the conclusion reached by the courts below is correct by

applying correct principles of law.

15. Mr.Patel has relied upon the decision in M/s. Bharat Iron Works v. Bhaghubhai Balubhai Patel, AIR 1976 SC 98, wherein the Apex Court has said that victimization is a serious charge by an employee against an employer and, therefore, it must be properly and adequately pleaded giving all particulars upon which the charge is based, to enable the employer to fully meet them. The onus of establishing a plea of victimization will be upon the person pleading it. Mere allegations, vague suggestions and insinuations are not enough. All particulars of the charge brought out, if believed, must be weighed by the Tribunal and a conclusion should be reached on a totality of the evidence produced. Relying upon the said judgment, Mr.Patel argued that there is no evidence and even allegation in the application that the action of the Management was arbitrary, or that, as such, it was a colourable exercise of power.

16. Mr.Patel has further relied on the decision of the Apex Court in State of Rajasthan and others v. Rameshwar Lal Gahlot, (1996) 1 SCC 595. In the aforesaid decision, it was held by the Honourable Supreme Court that when there is an appointment for a specified period, termination on expiry of such period, unless found to be mala fide and in colourable exercise of powers, would be a valid termination and Section 25-F is not attracted in such cases. In paragraph 4, the Honourable Supreme Court held as under :-

> " ... ...
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> 4. The controversy now stands concluded by a judgment of this Court reported in M. Venugopal v. Divisional Manager, LIC. Therein this Court has held that once an appointment is for a fixed period, Section 25-F does not apply as it is covered by clause (bb) of Section 2(oo) of the Act. It is contended for the respondent that since the order of the learned Single Judge was not challenged, the termination became final. Consequently, the appellant would be liable to pay back wages on reinstatement. In our considered view, the opinion expressed by the learned Single Judge as well as Division Bench are incorrect in law. When the appointment is for a fixed period, unless there is a finding that power under

clause (bb) of Section 2(oo) was misused or vitiated by its mala fide exercise, it cannot be held that the termination is illegal. In its absence, the employer could terminate the services in terms of the letter of appointment unless it is a colourable exercise of power. It must be established in each case that the power was misused by the management or the appointment for a fixed period was a colourable exercise of power. Unfortunately, neither the learned Single Judge nor the Division Bench recorded any finding in this behalf. Therefore, where the termination is in terms of letter of appointment saved by clause (bb), neither reinstatement or fresh appointment could be made. Since the appellant has not filed any appeal against the order of the learned Single Judge and respondent came to be appointed afresh on 27.6.1992, he would continue in service, till regular incumbent assumes office as originally ordered.

... ... "

17. Mr.Patel has also relied upon the decision of the Honourable Supreme Court in M. Venugopal v. Divisional Manager, LIC, (1994) 2 SCC 323. In the aforesaid judgment, the appellant before the Supreme Court was appointed as Divisional Officer by the Life Insurance Corporation on probation for a period of one year. Clause 11 of the appointment order provided that on satisfactorily completing the period of probation, the employee was to be confirmed in the service of the Corporation in Class II and his confirmation was subject to fulfilment of the minimum business guarantee set out in paragraph 10 of the appointment order. Subsequently, his probation period was extended as he failed to achieve the target. He was also asked to improve his performance and, ultimately, before the expiry of the extended period of probation, the service of the appellant was terminated on May 9, 1986. The said order was challenged by way of writ petition in the High Court. The learned single Judge set aside the order of termination on the ground that the appellant was a `workman' within the meaning of the Industrial Disputes Act and the termination of his service will amount to `retrenchment', within the provisions of Section 2(oo) of the Act and the said

action is null and void in view of the non-compliance of the requirement of Section 25-F of the Act. The said order was challenged in appeal and the Division Bench of the High Court took the view that because of clause (bb), which was introduced in Section 2(oo) of the Act with effect from August 18, 1984 by the Industrial Disputes (Amendment) Act, 1984, the termination of the services of the appellant by the Corporation within the period of probation shall not amount to retrenchment within the meaning of Section 2(oo). The said decision of the Division Bench was challenged by the appellant before the Apex Court. The Supreme Court, while dismissing the appeal, came to the conclusion that the termination of the service of the appellant shall not be deemed to be `retrenchment' within the meaning of Section 2(oo) even if sub-section (bb) had not been introduced in the said section. The amendments introduced in Section 48 of the Life Insurance Corporation Act have clearly excluded the provisions of the Industrial Disputes Act so far as they are in conflict with the Rules framed under Section 48(2)(cc). Once Section 2(oo) is not attracted, there is no question of application of Section 25-F, on the basis of which the termination of the service of the appellant can be held to be invalid. Considering the terms of the order of appointment, the Supreme Court came to the conclusion that the termination of the service of the appellant during the period of probation is in consonance with the terms of his appointment order read with Regulation 14 of the Regulations of the Corporation. The Supreme Court has also further observed that even under the general law, the services of a probationer can be terminated after making an assessment of his overall performance and no notice is required to be given for termination of such services.

Relying upon the said judgment, it was argued by Mr.Patel that once there is a tenure appointment, it is not required to follow the procedure under Section 25-F of the Act.

Mr.Patel has also argued that having accepted such temporary tenure appointment order, it was not open for the employee therafter to challenge the same on the ground that such order may amount to unfair labour practice. In his submission, it was open to the respondent to accept or reject the same as the condition was very much mentioned in the appointment order and that he was bound by the terms of appointment.

18. Mr.Patel has also relied upon the decision of the Apex Court in State of Haryana v. Om Prakash and

another, (1998) 8 SCC 733. In paragraph 3, the Honourable Supreme Court has held as under :-

" ... ...

3. Interim stay against the impugned award was granted on condition that the amount of back wages is deposited within 15 days. That condition has been satisfied. The High Court, in our view, was wrong in summarily rejecting the petition filed under Articles 226/227 of the Constitution because this, in our view, was a fit case where the jurisdiction was erroneously exercised by the Labour Court. The admitted facts show that after the first respondent was appointed with effect from 10.8.1985, he worked up to 30.6.1986 and thereafter ceased to report for work. The employer has not taken any step to terminate his service. He being a Daily-rated Workman himself chose to remain absent and it was after a period of almost three years that he raised a demand and the same came to be referred to the Industrial Tribunal-cum-Labour Court. The second question is whether there was a violation of Section 25-F of the Act. The authority below has come to the conclusion that he had worked for a period from 10.8.1985 to 30.6.1986 which would be less than one year. Therefore, the authority was wrong in concluding that he had worked for 240 days during 12 months immediately preceding the date of cessation of work. Besides no information was laid before the authority as to how many days during that period he had worked for, but in any case, he had not worked for 12 calendar months. There is also no evidence that he had worked for 240 days to satisfy Section 25-B of the Act. Therefore, the authority was wrong in coming to the conclusion that there was a violation of Section 25-F of the Act besides, as stated earlier, he himself voluntarily ceased to report for duty and there was no act on the part of the employer nor is there anything on record to suggest that the employer had refused work to him. Retrenchment within the meaning of Section 2(oo) means termination by the

> employer of the service of the workman for any reason whatsoever. Therefore, it contemplates an act on the part of the employer which puts an end to service to fall within the definition of the expression `retrenchment' in Section 2(oo) of the Act. There was nothing of the sort in the instant case. It was the workman who ceased to report for duty and even after he ceased to report for duty, it is not his case that at any point of time he reported for duty and he was refused work. He straightaway proceeded to invoke the provisions of the Act and, therefore, this is a case in which the employer has done nothing whatsoever to put an end to his employment and hence the case does not fall within the meaning of Section 2(oo) of the Act. Therefore, the case does not attract Section 2(oo), nor does it satisfy the requirements of Section 25-F.
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> ... ... "

19. Mr. Patel also further argued that the respondent was bound by the terms of appointment and to substantiate his say, he relied upon the decision of the Apex Court in Satischandra Anand v. Union of India, AIR 1953 SC 250.

Mr.Patel has also relied upon the decision of the Supreme Court in State of U.P. v. Kaushal, (1991) 1 SCC 691 to canvass the point that a temporary employee or a probationer has no right to a post.

The Apex Court in paragraph 25 of its decision in Mahendra Singh Dhantwal v. Hindustan Motors Ltd. and others, AIR 1976 SC 2062 has observed as under :-

> " ... ...
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> 25. Termination simpliciter or automatic termination of service under the conditions of service or under the standing order is outside the scope of Section 33 of the Act. This does not mean that the employer has the last word about the termination of service of an employee and can get away with it by describing it to be a simple termination in his letter of discharge

> addressed to the employee. It is also not a correct proposition of law that in case of a complaint under Section 33A the Tribunal would be debarred from going into the question whether, notwithstanding the form of the order, in substance, it is an action of dismissal for misconduct and not termination simpliciter.
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> ... ... "

Mr.Patel, however, submitted that similarly, when there is a tenure appointment, then such termination of service would be outside the scope of Section 25-F of the Act and even as per the Standing Order, the employer was entitled not to continue the services if it was found that even during temporary period, the employee has not rendered satisfactory services.

20. Mr.Patel has also relied upon the judgment of the Supreme Court in the case of Chandra Deo Gautam v. State of U.P. and others, 2000-II-LLJ 1639. In the said judgment, if the person is appointed on temporary basis and the order is not casting any stigma, then such order would be an order of simpliciter termination and the same cannot be challenged on the ground that no opportunity to show cause was given.

Mr.Patel has relied upon the judgment of the Supreme Court in Balwinder Singh & Others v. State of Punjab and others, 1999-II-LLJ 1411. In that case, which arose out of a petition under Article 226 of the Constitution of India, the Supreme Court took the view that if a person is appointed on ad hoc basis, such employees cannot claim reinstatement as of right and they are entitled to sympathetic consideration. It is required to be noted that in the aforesaid case, there was no question of consideration of Section 2(oo)(bb) and Section 25-F of the Industrial Disputes Act.

Mr.Patel has also relied upon the decision in Allahabad Bank v. Prem Singh, (1996) 10 SCC 597. In the said decision, in paragraph 9, it has been held by the Honourable Supreme Court as under :-

> " ... ...
>
> 9. This is not a case where by passing any order the existing services of a workman were terminated. The respondent was given

> employment for one day at a time with the issuance of successive letters. The relationship between the parties being contractual, the term of the contract was that the services stood terminated at the end of the day. The Tribunal has not given any reason whatsoever as to what was the obligation on the appellant to employ the respondent. The status of the respondent was, at best, that of a daily wager. By virtue of his letters of appointment he ceased to be employed at the end of each day. His day's service stood automatically terminated. This being so the decision of the Tribunal in holding that the respondent shall be deemed to have continued in service from 16.6.1977 and would also be entitled to usual pay and allowance is clearly untenable. The respondent could not insist on his being continued to be employed and the appellant was under no legal obligation to employ him.
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> ... ... "

Mr.Patel further argued that every time fresh appointment order was issued after the expiry of the period of previous order. According to him, by virtue of letters of employment, she ceased to be employed on the expiry of the period mentioned in the letter and her service stood terminated automatically. For the aforesaid proposition, he relied on the decision of the Apex Court in Birla VXL v. A.P., AIR 1999 SC 561.

21. Mr.Patel has also relied upon the judgment of the Supreme Court in the case of Escorts Limited v. Presiding Officer and another, (1997) 11 SCC 521, wherein the Supreme Court has taken the view that the termination of services of the concerned workman does not constitute retrenchment in view of clause (bb) of Section 2(oo) of the Act and clause (bb) excludes from the ambit of the expression `retrenchment', as defined in Section 2(oo) of the Act as a result of the non-renewal of the contract of employment.

22. Mr. Patel has also relied upon certain judgments of other High Courts to substantiate his say that Section 25-F is not applicable when there is a fixed term appointment in view of Section 2(oo)(bb) of the Industrial Disputes Act.

In case of Navodaya Vidyalaya v. K.R. Hemavathy, 2001-I-LLJ 779, a Division Bench of the Karnataka High Court has held that the Tribunal as also the learned single Judge have erred in directing reinstatement of the respondent for the simple reason that even if the respondent can be said to have worked continuously for more than 240 days but still the fact remains that she was working with the appellant under fixed term Contract of Service, and, therefore, it was not a `retrenchment', within the meaning of Clause (bb) of Section 2(oo) of the Act.

Mr.Patel has also relied upon the decision in Bhanmati Tapubhai Muliya v. State of Gujarat, 1995 (2) G.L.H. 228, where a Division Bench of this Court has taken a view that the employee, on expiry of term, has no right to continue on the post, and the appointment automatically comes to an end and no order of termination is necessary and no injunction can be readily granted in such cases allowing such an employee to continue beyond the term of appointment.

However, it is pertinent to note that the aforesaid matter was not in connection with the Industrial Disputes Act, but, there, the Court was more concerned with the provisions of Section 39 Rules 1 and 2 of the Code of Civil Procedure for granting interim injunction.

Reference is made to a decision in Purshottambhai R. Kachhadia v. State of Gujarat & Ors., 2000 (1) G.L.H. 553, where a learned single Judge of this Court has taken a view that in case of termination of daily wager, who is appointed for a fixed period and is given break, and when posted on different works, while working as a work charged employee, if the contract of employment is terminated after coming into force of Section 2(oo)(bb), termination would not amount to retrenchment if there is a provision under such contract for termination of employment.

Mr.Patel has also relied upon the decision in Executive Engineer, Roads and Building v. Rameshkumar K. Bhatt, 2000(1) G.L.H. 263, wherein the learned single Judge has taken a view that Section 25-F would not apply to a person employed for a fixed term unless the power is misused or vitiated by its mala fide exercise.

23. Mr.Patel has also relied upon various decisions of other High Courts, such as judgments of Delhi High Court, Tamil Nadu High Court, Kerala High Court, Madhya

Pradesh High Court, to substantiate his say that when there is a tenure appointment, in view of the provisions of Section 2(oo)(bb), Section 25-F has no application.

24. It is principally argued by Mr.Patel, therefore, relying upon the said judgments that since the respondent was appointed purely on temporary basis for a period of 29 days and since each order is a substantive appointment itself, and since her work was not found satisfactory during that temporary period, it was open for the Management not to continue her contract and that there was no necessity to comply with the provisions of Section 25-F of the I.D. Act and total number of days, whether 240 days or more, is not a relevant consideration, as, in view of the appointment order itself and in view of the provisions of Section 2(oo)(bb), provisions of Section 25-F are not attracted. Mr.Patel further argued that the reasoning of the learned single Judge for coming to the conclusion that it is a case of colourable exercise of power by the Management is not a correct one since there was no evidence or pleading on this aspect. He, therefore, argued that the appeal is required to be allowed and the order of reinstatement is required to be set aside.

Alternatively, it was submitted by Mr.Patel that, in any case, it is not a case where, after so many years, order of reinstatement should be given and, if, in any case, this Court is of the opinion that the view taken by the Labour Court, which was confirmed by the Industrial Court and the learned single Judge, is just and proper, then, at the most, the Court may consider the question of paying compensation instead of reinstating the concerned workman. To substantiate his say on this aspect, he has relied upon the decision of the Apex Court in Rattan Singh v. Union of India and another, (1997) 11 SCC 396. In the aforesaid case, the Supreme Court held that the services of an employee, who had served continuously for the requisite statutory minimum period in an year, were terminated without complying with Section 25-F of the I.D. Act and the said action was found to be illegal. However, considering the fact that since time of 20 years has elapsed since the termination of services, instead of directing reinstatement, a sum of Rs.25,000/- was directed to be paid in lieu of reinstatement and back wages.

Mr.Patel has also further argued that this is not a case in which full back wages should be given and for that purpose, he has relied upon the decision of the Supreme Court in M.C.D. v. Praveen Kumar Jain and

others, (1998) 9 SCC 468. The Supreme Court, in the said case, while upholding the order of reinstatement, reduced the back wages to 50%.

25. Mr.Clerk, appearing for the respondent, has also relied upon certain judgments of the Apex Court as well as of various High Courts.

Mr.Clerk relied upon the decision of the Apex Court in M/s. Hindustan Steel Ltd. v. The Presiding Officer, Labour Court, Orissa and others, AIR 1977 SC 31. The Supreme Court has said in the said judgment that termination of service by running out of time stipulated in the contract of service amounts to retrenchment. Non-compliance of Section 25-F(b) renders the retrenchment illegal and that the Labour Court was justified in granting the relief of reinstatement with full back wages.

Mr.Clerk has also relied upon the decision of the Apex Court in Central Bank of India v. S. Satyam and others, (1996) 5 SCC 419. In paragraph 9, it has been held by the Supreme Court as under :-

> " ... ...
>
> 9. The plain language of Section 25-H speaks only of re-employment of "retrenched workmen". The ordinary meaning of the expression "retrenched workmen" must relate to the wide meaning of `retrenchment' given in Section 2(oo). Section 25-F also uses the word `retrenchment' but qualifies it by use of the further words "workman ... who has been in continuous service for not less than one year". Thus, Section 25-F does not restrict the meaning of retrenchment but qualifies the category of retrenched workmen covered therein by use of the further words "workman ... who has been in continuous service for not less than one year". It is clear that Section 25-F applies to the retrenchment of a workman who has been in continuous service for not less than one year and not to any workman who has been in continuous service for less than one year; and it does not restrict or curtail the meaning of retrenchment merely because the provision therein is made only for the retrenchment of a workman who has been in continuous service for not less

than one year. Chapter V-A deals with all retrenchments while Section 25-F is confined only to the mode of retrenchment of workmen in continuous service for not less than one year. Section 25-G prescribes the principle for retrenchment and applies ordinarily the principle of "last come first go" which is not confined only to workmen who have been in continuous service for not less than one year, covered by Section 25-F.

... ... "

Mr.Clerk has also relied on the decision of the Apex Court in Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court, Chandigarh and others, (1990) 3 SCC 682. He has relied upon paragraph 81 of the said judgment which provides as under :-

" ... ...

81. As we have mentioned, industrial and labour legislation involves social and labour policy. Often they are passed in conformity with the resolutions of the International Labour Organisation. In Duport Steels v. Sirs, the House of Lords observed that there was a difference between applying the law and making it, and that judges ought to avoid becoming involved in controversial social issues, since this might affect their reputation in impartiality. Lord Diplock said :

" A statute passed to remedy what is perceived by Parliament to be a defect in the existing law may in actual operation turn out to have injurious consequences that Parliament did not anticipate at the time the statute was passed; if it had, it would have made some provision in the Act in order to prevent them ... But if this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts ..."

... ... "

26. It is required to be noted that the respondent herein was given temporary orders along with other similarly situated employees.

Mr.Clerk also further submitted that since there is a concurrent finding of three courts, i.e. of Labour Court, Industrial Court as well as by the learned single Judge, this Court may not re-appreciate the evidence and this Court may not come to a different conclusion on facts. Mr.Clerk further submitted that even in the temporary orders which were given to the employee, only in few orders there were some remarks in the orders to the effect that she may speed up the work. According to Mr.Clerk, there is nothing on the record to show that the work of the concerned employee was not satisfactory at all. He further submitted that the Management has not produced similar type of appointment orders of other employees, as, according to him, this may be routine remarks in all such orders. Mr.Clerk also submitted that if her services were to be terminated on the ground of unsatisfactory work, naturally, the employer should have served a termination order stating the said fact. He submitted that even in the last temporary order which was given to her, there was no such clause or advice given to the concerned employee and, therefore, it can be presumed that her work was found to be absolutely satisfactory. Mr.Clerk submitted that this was merely a camouflage to send the employee home.

27. Considering the various case law and considering the facts of the case, especially when we have gone through the evidence, which was led by the parties, we are of the opinion that the respondent employee was given tenure appointment orders from time to time for a long period, which extended beyond 240 days. It is no doubt true that the respondent has not specifically pleaded that the power exercised by the Management was nothing but a colourable exercise of power. However, the facts of the case as well as the evidence on the record clearly establish that such temporary orders were given from time to time and, therafter, the services of the respondent were terminated even though the work in question was still in existence. There is nothing on record to show that such work was not in existence at the relevant time when her services were terminated. In fact, at the time of argument, Mr.Patel himself has stated that if her work were found to have been satisfactory, she would have been

given permanent appointment. Therefore, it is not possible to believe that since the work, for which she was appointed, was not in existence, her services were not continued further. In so far as the unsatisfactory work is concerned, there is absolutely no reliable material for coming to the conclusion that her work was not satisfactory. Few orders on which reliance was placed by Mr.Patel do not inspire confidence to reach the conclusion that really, the work of the concerned employee was not satisfactory. In our opinion, it is not open for the Management to take the benefit of the nature of appointment order, i.e. tenure order, with a view to depriving the employee the benefit available under the Industrial Law. This is not a case, wherein only for a fixed type of work, like a Project, etc., an appointment is given and on completion of such work or project, the services of such employee is not required any further. On the contrary, the respondent-employee could have been continued in service even as per the say of Mr.Patel, if her services were found to be satisfactory. That shows that the work in question is still available and other similarly situated employees, who were appointed with the respondent, have been continued in service by the Management.

In fact, to continue a person for a very long time under temporary orders may amount to Unfair Labour Practice within the meaning of the Fifth Schedule of the Industrial Disputes Act, 1947. Clause 10 of the Fifth Schedule lays down that employment of workmen as "badlis", casuals or temporaries and continuing them as such for years, with the object of depriving them of the status and privileges of permanent workmen, may amount to Unfair Labour Practices. The Industrial Court, Surat, in appeal, has considered in paragraph 14 of its order, various appointment orders, which are 16 in number. The appellate court has observed that with a break of one or two days, fresh orders were used to be given to the respondent. The Court has also considered the evidence of the Management, wherein the Bank Manager has said that she cannot state whether any other employees have been continued in service after the termination of service of the respondent. The Industrial Court has not believed the evidence of this Bank Manager on the ground that it is difficult to believe that she is not aware about the aforesaid facts even after serving since 20 years. The Industrial Court has also found in the said paragraph that one Ashaben Pachhigar, who was also given temporary appointment from 8.1.1991 to 7.2.1991, was the sister-in-law of the Manager of the Bank and the said Ashaben was made permanent. Mention is made by the

Industrial Court in paragraph 14 of the judgment about similar types of appointments given to others. Considering the aforesaid benefit given to other similarly situated employees as well as considering the fact that the work in question was of a permanent nature, and the employees similarly appointed with the present respondent and even subsequently appointed, have also been made permanent, the Industrial Court has found that the action of the Management was deliberate and intentional not to give status of permanency to the present respondent with an object of depriving her the benefit of law. Under these circumstances, the appellate court has given a finding of fact that the action of Management is not bona fide and by keeping prejudice, she has not been given appointment in order to provide employment to others and that the work in question has continued even after the termination of service of the respondent. Considering the totality of the evidence, therefore, the Industrial Court has given detailed reasons starting from paragraph 14 onwards. It is no doubt true that the applicant, in her application or even in her approach letter before filing the application to the Court or in her evidence, has not clearly stated that the action in question is by way of colourable exercise of power. Still, the appellate court has considered the benefit given by the Bank to others and has also come to the conclusion that this is a case of victimisation, as observed in the concluding part of paragraph 14 of the order. Therefore, it is not possible for us to believe that the learned single Judge has given the said finding even though there is absolutely no evidence on the record, because, ultimately, the reasoning of the Industrial Court also is on the same line. Therefore, once it is found by the fact finding court, i.e. the Industrial Court, that the order in question is not bona fide and that it is passed by way of victimisation and the said reasoning is based on appreciation of evidence and when attention of the parties is focussed on this question, it cannot be said that the said finding of fact is based on no evidence or that the point is wrongly decided even though it was not in issue before the Court. In that case, even if there is no specific issue and if the evidence is already available on the record, such finding cannot be said to be vitiated. While exercising extraordinary powers under Article 226 of the Constitution of India, therefore, it is not possible for this Court to set aside the aforesaid finding of fact, and it cannot be said that the same is without any foundation worth the name. Though it is, no doubt, true that in case of a fixed term appointment, in view of Section 2(oo)(bb), the provisions of Section 25-F may not

have any application, the Court, exercising powers under the Industrial Disputes Act, can very well go into the questions whether the powers are exercised bona fide, whether it is by way of victimisation or whether it is passed solely with the object of depriving the employee the benefit available under the Industrial Disputes Act. It cannot be said that even if the order is passed by way of victimisation or in an arbitrary manner, or even if it is an unfair labour practice, then also simply because the appointment is for a fixed term, provisions of Section 25-F are not to be looked into at all. In our view, therefore, the said provision cannot be brushed aside if it is brought to the notice of the Court that the order in question was passed by way of victimisation or has not been passed with a bona fide intention. When the appellate court has specifically come to the conclusion, on appreciation of the evidence, it would hardly make any difference whether the concerned employee has pleaded that case in her application or not.

As stated earlier, certain facts are not in dispute that various appointment orders of temporary nature were issued from time to time to the respondent and similar orders were issued to other employees and, thereafter, even persons junior to the respondent were made permanent, coupled with the fact that there is no material except some few lines written in some of the temporary orders that the employee may increase her speed of work, and from the same, ipso facto, it cannot be said that her work was not satisfactory during the temporary period and, therefore, the action of not continuing her in service was not a bona fide and genuine action. Therefore, in our view, it is not open for the appellant to take benefit of tenure appointment unless such action is found to be reasonable, bona fide and genuine. The material on the record do not satisfy our conscience that the non-continuance of the respondent in service was bona fide. In view of the positive finding given by the appellate court, we are not in a position to accept the say of Mr.Patel, and as stated earlier, said provision of Section 2(oo)(bb) cannot be made applicable in all cases, where, based on evidence, it is found that the action of the employer is by way of victimisation or, in any case, is not bona fide.

28. It is required to be noted that the proceedings remained pending in various courts for a long time and the initial proceedings are of 1992. The Management, therefore, will be subjected to back wages for a long time. However, considering the facts and circumstances of the case, especially the fact that the Management has

not followed the provisions prescribed under Section 25-F of the I.D. Act before terminating the services of the concerned employee, which can be considered as a fault of a technical nature, as well as considering the totality of the circumstances of the case, we are of the opinion that it would be in the interest of justice to confine the back wages to 50% only.

29. In view of the aforesaid facts and circumstances of the case as well as considering the evidence of both the sides, especially considering the reasoning given by the Industrial Court, we do not think that we can disturb the said finding of fact in this Letters Patent Appeal and accordingly, we confirm the order of reinstatement passed by the Labour Court, but we reduce the back wages from 100% to 50%. The appeal is, therefore, allowed only to the limited extent of back wages. The appellant Management may comply with this order, i.e. direction of reinstatement and payment of 50% back wages, within a period of one month from today. It is clarified that if any interim payment is made by the appellant to the respondent, such payment should be deducted while calculating 50% of back wages which are required to be paid by the Management to the respondent.

Appeal is allowed to the aforesaid extent with no order as to costs.

In view of the above order, no order need be passed in Civil Application No.6614 of 2000.

April 21, 2001 (D.M. Dharmadhikari, C.J.)

(P.B. Majmudar, J.)

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Mr.Chauhan, learned counsel for the appellant, requested to grant some time for approaching the Apex Court, but since we have already granted one month's time for complying with the direction of reinstatement and payment of 50% back wages, it is not necessary to grant any more time. The said prayer, therefore, cannot be accepted.

21st April, 2001 (D.M. Dharmadhikari, C.J.)

(P.B. Majmudar, J.)

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(apj)